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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 81

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGIA PUBLIC SERVICE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 92–101) is reported at 197 F. Supp. 793.

JURISDICTION

The judgment of the district court, embodied in its opinion, was entered on October 2, 1961 (R. 101); and a notice of appeal was filed by the United States on November 30, 1961 (R. 102). By orders entered in the district court on January 19, 1962, and February 23, 1962, the time for docketing this case on appeal was extended to and including March 15, 1962 (R. 104, 106). This Court, on May 21, 1962, postponed consideration of the question of jurisdiction

until the hearing on the merits, (R. 206; 369 U.S. 882). The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Whether the district court erred in holding that the States of Georgia could constitutionally prohibit motor common carriers from contracting with the United States, for the intrastate transportation of household goods and personal effects of military and civilian personnel of the United States, at rates other than those prescribed by the Georgia Public Service Commission.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Georgia statutes dealing with the authority of the Georgia Public Service Commission to regulate rates for intrastate transportation by motor common carriers, and the penalties for violations, are set forth in Appendix A, *infra*, pp. 69–70. Pertinent provisions of the federal statutes and regulations applicable to procurement of transportation services generally, and transportation of household goods in particular, are set forth in Appendix B, *infra*, pp. 71–84.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court convened in the Northern District of Georgia. The court granted summary judgment against the United States in an action to enjoin the Georgia Public Service Commission from prohibiting rail and motor carriers from contracting with military and civilian agencies of the federal government for

transportation within Georgia, at rates other than those prescribed by the Commission, of property of United States government personnel. The government contended that the state regulatory system conflicted with the governing federal procurement policy in violation of the Supremacy Clause of the Federal Constitution, and also directly burdened the United States in the discharge of various constitutional powers.[1] The district court held, however, that the state regulations were not in conflict with any federal policy; that they merely imposed a nondiscriminatory economic burden on the federal government; and were therefore constitutional. The relevant facts, which are not in dispute, are as follows:

I. BACKGROUND

The federal procurement statutes and regulations provide the procedures and standards for contracting with carriers for the shipment of property that the United States owns or is under an obligation to transport. No distinction is made in the applicable legislation or the regulations promulgated thereunder between interstate and intrastate shipments (R. 3, 37, 50, 88; see R. 38-47 (Department of Defense directive), 51-66 (General Services Administration regulations), 67-73 (Bureau of the Budget regulations)).

Household goods belonging to military and civilian personnel of the federal government and their dependents constitute a significant part of the property

[1] Transportation for the United States of goods moving in interstate commerce is specifically exempted from the rate regulations of the Interstate Commerce Act by Section 22 thereof, 49 U.S.C. 22.

transported under United States government contracts. The government is required by law to pay the cost of such transportation (5 U.S.C. 73b-1; 37 U.S.C. 253(c); App. B, *infra*, pp. 71–72). Where the transportation of household goods is between two government establishments, military or civilian, it is generally handled by federal transportation officers who make "all the arrangements with the carrier for the crating, packing, pickup, line haul, and delivery of the property. It is shipped on government bill of lading and * * * [t]he carrier is paid by a United States disbursing officer with a government check" (R. 36 (military); see R. 12–13, 47–50 (similar General Services Administration procedure for transferring household goods of civilian personnel)).

Within the State of Georgia there are approximately 25 federal military installations and a number of civil establishments (R. 2, 9, 12). In 1960, about "1,100 Georgia intrastate van carrier shipments" of household goods of members of the armed services moved between these installations (R. 9). These shipments weighed approximately four million pounds and cost the government about $175,000 (*ibid.*).[2] In addition, the cost of shipping the household goods of personnel of civilian governmental agencies between establishments located within the State of Georgia was substantial (R. 2).

[2] Throughout the nation, approximately $400 million is spent each year by the United States to transport the household effects of civilian and military personnel of the Department of Defense (R. 36).

On July 15, 1970, the United States Department of Public Health, Communicable Disease Center of Atlanta, Georgia, requested George D. Krueger, GSA Region IV Director, Transportation and Public Utilities Service, "to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of Communicable Disease Center employees on transfer from Savannah to Atlanta, Georgia and vicinity" (R. 12). Krueger thereupon issued an invitation to 54 qualified Georgia carriers for bids on a per-hundred-pound basis covering the entire mass movement (*ibid.*). In response, 13 carriers submitted sealed bids: eight quoted rates and charges as published in Georgia Household Goods Tariff No. 1-B, MF No. 3, App. C (see pp. 85-86, *infra*); the remaining five carriers (Nos. 1, 10, 11, 12 and 13 on the GSA Abstract of Bids—R. 15) quoted rates different from those published in that tariff (R. 12-13).

Upon an evaluation of all bids, the carriage contract was awarded to "the lowest responsive bidder," Consolidated Van & Storage Companies, Inc.—one of the five carriers submitting a bid on a basis other than that prescribed by the Commission's tariff (R. 13). Consolidated deviated from the tariff by quoting, as requested by the GSA invitation for bids, a single per-hundred-pound rate for shipping and packing the mass shipment (*ibid.*). The Georgia tariff did not permit quotation of a mass-shipment rate for transporting household goods of more than one family. It provided that "[p]roperty of two or more families or establishments will not be ac-

cepted for transportation as a single shipment" (Georgia Household Goods Tariff No. 1–B, MF No. 3, Section 1, Rule 15, App. C, *infra*, p. 85), and required carriers to quote schedules of approved rates (see *id.*, Sections II, III, pp. 16–20 (as amended), with the total charge to be the sum of the charges figured for individual families, primarily on the basis of the weight of their property (*id.*, Section 1, Rule 8, App. C, *infra*, p. 85).

Several of the unsuccessful bidders complained to the Commission that Consolidated had quoted other than approved rates; the Commission thereupon warned all five carriers whose bids deviated from the tariff that, if they performed at the rates quoted to GSA, the Commission would revoke their intrastate operating permits for violating its rules (R. 13). As a result of this threat, Consolidated, on August 23, 1960, notified GSA that it was defaulting on the contract (R. 13, 18). Unable to obtain carriage at rates other than those approved by the Commission, GSA was thereby compelled to transport the approximately 43,676-pound shipment at the prescribed rates at an increase in cost of about 66⅔% over the charges originally quoted by Consolidated (see R. 26).

Notwithstanding Consolidated's refusal to perform its contract with GSA, the Commission, on Septem-

[1] The actual expense of the shipment was about $2,899.11 (at the time this action was instituted, two families had not yet moved and cost data in the record relating to them are estimates) (R. 26). Transportation at the charges quoted by Consolidated would have cost only approximately $1,738.30—a saving of about $1,160.81 (*ibid.*).

ber 26, 1960, issued a rule *nisi* looking towards revocation of Consolidated's certificate (R. 17-18). An attorney for GSA, as a representative of the United States, appeared at the hearing and petitioned the Commission to allow the United States "to intervene in the proceeding and present evidence" as to the question whether the Commission had jurisdiction "to regulate the rates for shipments by the United States between points in Georgia" (R. 4-5). This petition was denied (R. 5). The Commission also refused to allow Krueger, the GSA official responsible for procurement of the contract, to testify as to the facts and circumstances of the transaction (R. 14).[4]

2. THE PROCEEDINGS BELOW

Faced with this situation, in which carriers were being threatened with loss of their certificates if they submitted bids to the government for interstate movements of household goods at rates other than those prescribed by the State Commission, the United States filed a complaint in the United States District Court for the Northern District of Georgia on March 9, 1961, pursuant to the provisions of 28 U.S.C. 1331, 1345, 2201, 2281 and 2284 (R. 1). The complaint requested the convocation of a three-judge court; recited the background facts previously described as to the federal procurement policy and the conflict with Georgia statutes illustrated by the GSA transaction; and alleged that "[a]s a result of the actions of The

[4] We have been informed that the Georgia Public Service Commission has deferred further proceedings in the *Consolidated* case pending the outcome of the present litigation.

Georgia Public Service Commission as set forth above the carriers in the State of Georgia will not submit competitive bids for the carriage of property for the United States or enter into any contract with the United States for the carriage of property except at rates prescribed by the Commission, and the Commission continues to regulate such rates from day to day" (R. 5). The Georgia statutes, as thus applied, were asserted to be "unconstitutional and void" under the Supremacy Clause because (1) they placed an "unreasonable burden and impediment" upon the exercise by the United States of its constitutional powers under Art. I, Sec. 8, Cls. 7, 12, 13, 16 and 17 and Art. IV, Sec. 3, Cl. 2—provisions authorizing establishment and maintenance of post offices, the army, navy and militia, and the disposition and regulation of federal territory and property; (2) they unreasonably burdened interstate commerce in an area under exclusive congressional jurisdiction under Art. I, Sec. 8, Cl. 3—the Commerce Power; and (3) they contravened the congressional policy "relating to the negotiation for the transporting of property for the United States", citing the Federal Property and Administrative Services Act of 1949 and "the regulations of the various departments and agencies of the United States issued pursuant thereto" (R. 5–6). The complaint sought a judgment declaring that the Georgia statutes are unconstitutional and void insofar as they prohibit carriers from entering into contracts with the United States for the intrastate shipment of government property, and of household effects of government personnel, at rates other than those ap-

proved by the State Commission; and enjoining the Commission from taking any action under such statutes which would prevent the United States and the carriers from entering into contracts with respect to rates for the shipment of such property (R. 6–7).[5]

On April 28, 1961, the Georgia Public Service Commission moved to dismiss the complaint on the ground that the cited Georgia statutes "do not in express terms apply to carriers transporting property for the federal government nor has the Supreme Court of Georgia ever construed these Code Sections as to their applicability to carriers of property for the federal government" (R. 22–23). In its supporting brief the Commission merely reasserted the above allegations of the motion to dismiss. It did not contend that the statutes were on their face ambiguous, nor did it contend that they could or should be interpreted as not applying to the intrastate transportation of goods for the federal government even if the statute would otherwise be inconsistent with the Federal Constitution. In opposition the United States pointed out that the construction of the Georgia statutes advocated by the Commission was in accordance with the advice of the attorney general of the State of Georgia (see R. 79–81, 82–84), that it had never been suggested there was any question as to the applicability of the statutes to the federal government, except the consti-

[5] The complaint (R. 6) also sought an interlocutory injunction which was issued on May 5, 1961, to restrain the Commission from "exercising * * * any jurisdiction over transportation charges for the transportation at the United States Government's request of property of United States Government personnel" (R. 30).

tutional problem raised in the government's suit, and that under these circumstances dismissal of the action or holding it in abeyance pending reference to the state courts could only result in delaying resolution of the question to the detriment of the United States (R. 27–28).

On May 8, 1961, the three-judge district court denied the motion to dismiss stating (R. 32):

> It appearing that the plaintiff sought to intervene in one proceeding before the defendant touching on this question, and that its right to intervene was denied by the defendant, and it not appearing that there is any convenient or prompt or effective means by which the issue here presented can be passed upon by the courts of the state of Georgia, except by the filing of a suit in the Georgia courts by the United States, the motion is hereby DENIED.

On May 17, 1961, the government responded to defendant's motion for a more definite statement of the issues. It stated that, two weeks earlier, it had discovered that the Georgia Commission no longer asserted the power to regulate rates for intrastate shipments of property belonging to the United States, upon the advice of the state attorney general as to the impact of *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (R. 74–75). Accordingly, the United States restated the issue in the case as whether Georgia could constitutionally regulate the rates for "carriage of the household goods and personal effects of personnel of the United States when the contract is the contract of the United States and the United States assumes the sole responsibility of

paying the carrier for the carriage by the terms of the contract" (R. 75–76).

The defendant on May 31, 1961, filed an answer admitting, with respect to the transportation of household goods, all of the material allegations of the complaint except those relating to the procedures normally followed by the United States in handling such goods, which the answer neither admitted nor denied (R. 87–90). Specifically, the answer admitted the allegation that, as a result of the actions of the Commission, carriers licensed in the State of Georgia would not submit competitive bids except at rates prescribed by the Commission (R. 89). The Commission also admitted "that there is a real controversy between the United States and itself as to the constitutional authority of the defendant in pursuance of the Georgia statutory provisions above cited to regulate the rates which may be charged by carriers for the intrastate carriage of the household goods of the United States military and civilian personnel within the State of Georgia" (R. 89–90).

On the basis of the pleadings and several affidavits of federal military and civilian personnel, the United States filed a motion for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure (R. 34). The affidavits generally stated that enforced compliance with state regulation would severely hamper the functioning of the military transportation operation (R. 10, 37) and would "disrupt the existing rate structure applicable on Government traffic" (R. 9). A cross motion for summary judgment was filed by the Commission (R. 91). After

hearing oral argument, the district court, on October 2, 1961, granted summary judgment for the Commission.

3. THE OPINION OF THE DISTRICT COURT

At the outset of its opinion, the district court noted that the Georgia Commission "conceives it to be its duty to prevent carriers from contracting with military or other federal government agencies to carry household goods of individual employees of the United States, when such shipments are wholly within the state of Georgia, at less than the published tariffs" (R. 92).[6] It recognized further that the federal government "has the power, if it elects to exercise it, to prevent any interference by way of state regulatory schemes" with federal activities and that the states cannot directly regulate the performance by federal officials of governmental functions (R. 93). Georgia's regulation of the rates at which the United States may ship the household goods of its personnel within the state could only be upheld, the court concluded, if it constituted a nondiscriminatory regulation that only "to some degree affect[ed] either the cost of the government's operation within the state or increase[d] difficulties touching on such operation" (R. 93–94). Thus, the issue presented was defined as whether "the

[6] The court stated that, "No issue is presented touching on the right of the Commission to regulate the rates charged by Georgia carriers for the carriage of strictly governmental property" because the Commission had conceded that the decision in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, "foreclosed" this question "in favor of the United States" (R. 92).

Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations" (R. 94). Resolution of this issue, in the court's view, required a determination of whether, on the facts here, the case was controlled by *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, striking down state regulation of transportation rates charged the United States, or *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, sustaining state regulation of milk prices charged the United States (R. 96). Disagreeing with the basis on which this court in *California Commission* distinguished *Penn Dairies* (R. 96-97), the district court concluded that the only true distinction between the cases lay in "the difference in the character of the commodities dealt with"—"military goods" in *California Commission*, "milk" in *Penn Dairies* (R. 98).[7] It recognized that "there is less of a prohibition on the national government where a state [California] says it may negoti-

[7] The reasoning of the district court was as follows: This Court's holding in *Penn Dairies* was based on its finding that the State statute "imposes no prohibition on the national government or its officers" (R. 94); and this Court's distinction of *Penn Dairies* in *California Commission* rested upon a finding that the applicable California statute "places a prohibition on the federal government", citing criminal penalties applicable to shippers (R. 96-97). The district court asserted, however, that both the Pennsylvania and California statutes involved in those cases had criminal penalties applicable to the purchaser or shipper as well as the seller. The court below was therefore "just not able to conclude that the Supreme Court, in the California case, found any distinguishing characteristic here" (R. 97-98). The district court then

ate contracts if its (*sic.*) requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all" (R. 97). Nevertheless, the court ruled that "[s]ince the shipment of household goods * * * does not present the unique and difficult problems encountered when military supplies are involved" (R. 100), the decision in *Penn Dairies* was dispositive of this case.[7]

SUMMARY OF ARGUMENT

I

A. The Court has jurisdiction of this direct appeal under 28 U.S.C. 1253. Direct appeal lies under that section from a suit "required to be heard by a district court of three judges." Thus, the sole question is whether the three-judge court below was properly convened under 28 U.S.C. 2281.

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devised the distinction stated in the text, between the commodities involved.

The district court's statement of the applicable Pennsylvania and California statutes was erroneous, see *infra*, fn. 27a, p. 53. The court also ignored an additional ground given in *California Commission* for distinguishing *Penn Dairies*, that the Pennsylvania statute had been found not to conflict with federal procurement policy while, in California, "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear." 355 U.S. at 544.

[8] The court qualified this choice when it stated (R. 100): "Assuming that the Penn Dairies case still stands as a precedent, as we must, we are compelled to conclude that the Georgia Public Service Commission can legally do what the Georgia statute says it can do. If our assumption of the continuing vitality of Penn Dairies is incorrect it must remain for the Supreme Court to say so."

A three-judge court is required, under Section 2281, to adjudicate substantial claims of "unconstitutionality" of state law based upon either (1) direct contravention of constitutional provisions limiting state power or delegating power to the federal government, or (2) violation of the Supremacy Clause through conflict with federal legislation, when the alleged conflict presents "a sole, immediate constitutional question" of federal supremacy without preliminary "issues of statutory construction." *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 158.

The complaint in this case alleged that the Georgia statutes providing for regulation of intrastate motor carrier rates were "unconstitutional and void" as applied to transportation for the United States on the grounds, *inter alia*, that (1) they burdened the exercise by the United States of its powers to maintain the armed services, to regulate federal territory and property, and to carry out other constitutional functions and (2) they contravened the procurement policy established by federal statutes and regulations. A substantial issue was presented by the first alleged ground of unconstitutionality (which did not involve any claim of conflict with federal legislation) both initially, when the controversy included state regulation of rates for transportation of property owned by the United States, and as finally adjudicated, when the complaint was limited to regulation of rates for the transportation of household goods of government personnel moved under government contracts. Accordingly, a three-judge court was required to adjudicate it, and this Court need not reach the question

whether the three-judge court was properly convened to decide the Supremacy Clause question.

B. Not only is this case within the jurisdiction of the Court, but it is clearly one in which such jurisdiction should be exercised. There is no unsettled question or ambiguity of state law here, resolution of which might avert the constitutional issue and suggest abstention in favor of state litigation. The applicability of the state law to transportation for the United States is clear and the only real controversy is the existence of constitutional limitations. Therefore, there is no reason for the federal courts to defer to the Georgia tribunals.

II

A. The federal policy governing procurement of transportation services and its impact upon state regulation—were considered by this Court four years ago in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. That case involved a suit by the United States to enjoin the enforcement—as applied to shipments by the federal government—of a California statute which authorized a state commission to fix rates for intrastate transportation by common carriers, and which permitted regulated carriers to charge reduced rates to the United States only (p. 535) "'to such extent and subject to such conditions as [the state commission] may consider just and reasonable.'"

This Court examined the "comprehensive policy governing procurement" established by Congress, and the implementing regulations (p. 540). Citing, *inter*

alia, regulations directing choice of "the least costly means of transportation", negotiation for "adjusted or modified rates" for "volume shipments", and negotiation to avoid "excessive" or "unreasonable" rates (p. 542), the Court concluded (pp. 542-543) that "these regulations—which have the force of law [citations omitted]—sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken". That decision thus definitively construed the federal procurement laws governing military traffic as establishing a federal policy of freely contracting for transportation services at economical rates.

The military procurement statutes (10 U.S.C. 2301-2314) involved in *Public Utilities Commission of California* remain in effect as the basic provisions for all procurement of supplies and services by the armed services, and the present regulations continue the same policy found in that case of freely contracting for transportation services at lower than current rates. Thus, these regulations provide, *inter alia*, that local transportation officials are to "be constantly alert to identify opportunities for rate negotiations" in situations where the government will pay the transportation charges of a "planned volume movement", and are to transmit to the Executive Director certain specified information on any shipment as to which they believe the "rating is unreasonable", so that negotiations for a revision can commence. Specifically as to movements of house-

hold goods, the policy of the armed services, as expressed in a Department of Defense Directive (R. 38–47), is "to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government" (R. 39).

Procurement by nondefense agencies, insofar as here pertinent, is carried out under the authority of the General Services Administration. The basic statutory provisions (41 U.S.C. 251–260) are substantially similar to the armed services procurement provisions and were enacted to extend to GSA the principles of armed services procurement. The pertinent nondefense regulations are likewise similar to the military regulations and establish a policy of freely contracting for transportation services at economical rates. For example, as to movements of household goods, the regulations provide, *inter alia,* for use of government bills of lading, under which the United States "assumes responsibility for dealings with carriers, including negotiating rates, selecting carriers, and auditing and paying transportation vouchers", whenever "actual transportation charges will be substantially below the amounts which the Government would be required to pay" if it merely reimbursed transferred personnel for having their goods transported individually (R. 71).

B. In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, this Court invalidated a California statute regulating intrastate motor carrier rates, insofar as it applied to transportation for the United States. The Court held that "the conflict be-

tween the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear" (p. 544). The same result is required in this case.

The federal procurement policy entrusts "procurement officers with the discretion to determine when existing rates will be accepted" (355 U.S. at 543), requires solicitation of rates lower than generally applicable ones if these are unreasonable, and provides in detail for the use of public bidding and negotiation to obtain favored treatment reflecting the volume of the government's shipment. The Georgia statute prohibits both federal procurement officers and state carriers from either agreeing upon a rate lower than the generally applicable one prescribed by the Georgia Public Service Commission or arranging for mass shipments of the property of more than one family. The conflict between the federal policy of freely contracting for the lowest overall rates and state regulation of rates is thus, as in *Public Utilities Commission of California*, "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve" (355 U.S. at 544), and the Georgia statute must give way.

III

Even apart from the effects of the federal statutes and regulations, the Georgia rate regulation is unconstitutional because it violates the United States' inherent constitutional immunity from State regulation. Two rules for determining the scope of this immunity are well settled. First, a State may not directly regulate or tax the property, instrumentalities or

activities of the United States. Second, the fact that nondiscriminatory State taxation or regulation of one doing business with the United States may impose an increased economic burden upon the United States is not alone enough to give the contractor immunity from taxation or regulation.

One elaboration of the first rule is firmly established and clearly applicable to the present case. A State may neither address a command to nor impose a tax upon the officers and agents of the United States when they are acting in the course of their constitutional powers. Here Georgia's statute, by its terms, imposes criminal sanctions upon any government procurement officer who fails to comply with Georgia's directions as to what terms the federal government may offer and solicit in obtaining transportation services.

We do not stand on this ground of unconstitutionality alone. A State may not tax or regulate the activities of the federal government even if its command is not, as in the present case, verbally addressed to a class including the United States and its agents. It is the activities of the United States—including the exercise of its power to contract—which must be free of direct State interference. A State may not regulate the terms of a transaction by which the United States obtains services or supplies regardless of whether the State's command is addressed to a federal procurement officer or takes the form of a restriction on the contracting powers of all the potential sellers of goods or services to the United States.

This immunity of the transactions of the United States from State regulation or taxation is supported

by the prior decisions of this Court as well as by the reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself.

A. Justice Bradley's statement in *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42 that a contract "is the means employed for carrying into execution the powers of the government" and therefore "is exempt from taxation or other interference by the State government" has never been rejected by this Court and was indeed repeated with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155. This doctrine has been squarely applied in cases involving sales taxes which are in terms addressed only to the seller and not to the federal government but which have nevertheless been held to violate a line of decisions that "consistently prohibit taxes levied on the * * * purchases of the Government itself." *Kern Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 123. There is no ground for distinction between a tax upon sales which the seller is required to collect from the buyer and a State law fixing the price which the seller is required to collect.

B. It is equally clear that the three dominant reasons for the immunity of the United States from State regulation or taxation addressed to the federal government or its agents, also support the proposition that a State may not directly regulate the terms of the contracts of the United States.

First, only unseemly and harassing conflicts could result from the recognition of a State's capacity to regulate the exercise of powers entrusted to the United States by the Constitution. Here Georgia has

frankly asserted the power to dictate the terms in contracts of the United States for transportation of household goods by forbidding every intrastate carrier from agreeing to a rate below that set by the Georgia Public Service Commission or accepting the property of more than one family as a single shipment. Regulation of the terms which private parties may put into contracts with the United States is regulation of the terms for which the United States may contract.

Second, regulation of the transactions of the United States, no less than regulation of its other activities, is likely to impede the performance of federal functions. In the present case a significant administrative burden would fall upon federal procurement officials if they were required to comply with State rate regulation. In a case such as *Public Utilities Commission of California* v. *United States*, *supra*, the burden would be such as actually to imperil the nation's defense efforts. But the controlling principle—freedom of the United States from interference with the exercise of its contracting powers—does not depend upon an assessment of the degree of interference in every case. Interference to some significant degree is inherent in any attempt by a State to regulate the terms of a federal contract just as it is inherent in State regulation of the official activities of federal officers. In both cases it is constitutionally forbidden.

Finally, the prohibition of State taxation addressed to the federal government is intended to draw a line which at once protects the United States from any State's attempt to write a check on the federal treas-

ury and yet does not grant an unwarranted immunity to an ever-increasing class of State residents who happen to have done business with the United States rather than with some other purchaser of goods or services. Where the tax is imposed upon a contractor, the ultimate incidence of the economic burden is, at best, uncertain. Recognition of a constitutional immunity may as easily result in a windfall to the contractor as in protection of the United States from becoming the intended source of State revenue. But when the tax is upon the United States, the immunity exists, for its recognition gives no special privilege to private citizens and, without it, each State would be free to raise its revenue at federal expense.

Georgia's price regulation, like a tax upon federal property or privileges, is intended to make use of the federal treasury to increase the return to Georgia's carriers. Georgia is attempting to fix the exact burden which must be borne exclusively by the federal government for the benefit of Georgia residents. This imposition, which is unnecessary to protect valid State interests and which, like a direct tax, opens the federal treasury to State uses, is for these reasons, too, unconstitutional.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THIS DIRECT APPEAL FROM THE THREE-JUDGE COURT, WHICH WAS PROPERLY CONVENED

In its order of May 21, 1962 (R. 106), the Court postponed a determination of jurisdiction and directed the parties "to brief and argue, in addition

to the merits, the question of this Court's jurisdiction on direct appeal under 28 U.S.C. § 1253; see 28 U.S.C. § 2281; cf. Kesler v. Department of Public Safety, 369 U.S. 153, 155–158." The condition of direct appeal under 28 U.S.C. 1253 is that the suit be one "required * * * to be heard * * * by a district court of three judges". The question thus raised is whether the three-judge court below was properly convened under 28 U.S.C. 2281—that is, whether the government's suit was brought to enjoin the enforcement of a Georgia statute on "the ground of the unconstitutionality of such statute," within the meaning of that section.

A. The "unconstitutionality" of State law for the purpose of 28 U.S.C. 2281 may be asserted in two ways. First, it may be claimed that State law directly contravenes constitutional provisions limiting state power (*e.g.*, Art. I, Sec. 10; the Fourteenth Amendment) or delegating power to the federal government (*e.g.*, Art. I, Sec. 8). It is undisputed that if such a claim is substantial, a three-judge court is required to adjudicate it. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73. Second, it may be claimed, as in *Kesler* v. *Department of Public Safety*, *supra*, that a State law conflicts with federal legislation and hence violates the Constitution through the provision of the Supremacy Clause (Article VI, clause 2) that "the Laws of the United States" as well as "[t]his Constitution", "shall be the supreme Law of the Land". In *Kesler*, the Court, in an opinion by Justice Frankfurter, held that a three-judge court was re-

quired when the alleged conflict between federal and State statutes presented "a sole, immediate constitutional question" of federal supremacy without preliminary "issues of statutory construction" (369 U.S. at 158). Dissenting, Chief Justice Warren (joined on this point by Justice Stewart) urged that conflicts of federal and State legislation do not involve a claim of "unconstitutionality" within 28 U.S.C. 2281.

The complaint in the instant case alleged grounds of unconstitutionality which brought the case under the first head of jurisdiction for a three-judge court without the necessity of considering the second." [9]

The complaint alleged that the Georgia statutes providing for regulation of intrastate motor carrier rates by the State Public Service Commission were unconstitutional and void because they burdened the exercise by the United States of its powers to maintain the armed services, to regulate federal territory and property, and to carry out other constitutional functions. This ground of attack upon the Georgia stat-

[9] The introductory phrase of Para. VI alleged that the Georgia statutes were "unconstitutional and void under Article VI, Section 3, Clause 2", (the Supremacy Clause) on the three grounds cited. The Supremacy Clause is, of course, involved when State law directly conflicts with another constitutional provision or with federal legislation since that clause is necessary to make both "[t]his Constitution" and "the Laws of the United States" superior to State law. However, direct conflict with other constitutional provisions (the first two grounds alleged in Para. VI) does not present the issue of the *Kesler* case. The *Kesler* language, "invalidation * * * by virtue of the Supremacy Clause" (369 U.S. at 156), is limited to conflicts with federal statutes in which the Supremacy Clause is the only constitutional provision involved.

utes did not involve any claim of conflict with federal legislation; it relied directly upon the implied constitutional immunity. Furthermore, the claim obviously presented a substantial issue, both as originally filed when the controversy included Georgia's assertion of power to regulate rates for transportation of property owned by the United States (R. 5–6, 29) and as subsequently limited to transportation of household goods and personal effects of government personnel on government contracts (R. 75–76). The court below in effect so acknowledged. It noted that the State could not constitutionally regulate federal officials in the performance of their governmental functions (R. 93). And it expressly posed as a constitutional issue—besides the conflict of statutes—"whether the Georgia laws place a direct prohibition on the agencies of the federal government" (R. 94). We believe the district court answered this question erroneously, as shown in Point III, *infra*. On this ground, a three-judge court was required, even if the constitutional question were joined with issues under the Supremacy Clause not involving "unconstitutionality" within the meaning of 28 U.S.C. 2281.[10] This

[10] Once the three-judge court was thus convened, the case would be properly brought here on direct appeal even if the decision below—and the appeal—rested on nonconstitutional grounds. *Florida Lime & Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. at 80–81, 84–85 (opinion of Court), 89–90 (dissent); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391; *Sterling* v. *Constantin*, 287 U.S. 378, 393–394.

On this record, we do not claim that a sufficiently substantial question was presented by the complaint's second alleged ground of unconstitutionality, burden on interstate commerce, to warrant a three-judge court.

was the holding of *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, where this Court stated (at 85):

> Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though unconstitutional grounds of attack are also alleged, we think the case is one that is "*required* by * * * Act of Congress to be heard and determined by a district court of *three* judges." 28 U.S.C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

B. Not only is this case within the jurisdiction of the Court, but it is clearly one in which such jurisdiction should be exercised. There is no unsettled question or ambiguity of State law, the resolution of which might avert the constitutional issue and hence suggest abstention in favor of State litigation. By its terms Georgia law purports to cover intrastate motor transportation for the United States; it applies to all "rates, fares and charges for transportation by motor common carriers of passengers, baggage and property" (Ga. Code Ann., Sec. 68–613, App. A, p. 69). Although defendant unsuccessfully moved to dismiss on the ground that the State supreme court should construe the state law,[11] it has not suggested any possible limitation upon the jurisdiction of the Georgia Commission other than

[11] The Georgia Commission's belief that there is no issue of state law is further demonstrated by its actions in denying the United States permission to intervene in its proceeding to discipline a carrier for bidding on the invitation of the United States, and in deferring such proceeding pending the outcome of this litigation on the constitutional issue.

that commanded by the Federal Constitution. In its answer, the defendant Commission acknowledged that it asserted the power to regulate rates for intrastate carriage of household goods of military and civilian personnel of the United States, and that it ceased claiming similar power over property owned by the United States only upon the advice of the Georgia attorney general in 1958 that it lacked authority (R. 88–89). The cited 1958 opinion of the State attorney general (R. 82–84), as well as his 1954 opinion, sustaining broader State authority prior to *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (R. 77–81), dealt only with interpretation of the Federal Constitution and decisions of this Court. The Commission further admitted that there is a "real controversy" between the parties "as to the constitutional authority of the defendant" to regulate the rates at issue (R. 89-90).

When the applicability of the state law is clear, and the only "real controversy" is the existence of constitutional limitations, there is no basis for the federal court to stay its decision. *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77, 84; *Toomer* v. *Witsell*, 334 U.S. 385, 392, n. 15. "Though never interpreted by a State court, if a State statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *United States* v. *Livingston*, 179 F. Supp. 9, 12–13 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 284 (immunity of United States from state taxation); *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185, 196; *Quicy* v. *United States*, 316 U.S. 486, 490.

II

THE GEORGIA RATE-FIXING STATUTES ARE INCONSISTENT WITH THE FEDERAL STATUTES AND REGULATIONS GOVERNING PROCUREMENT OF TRANSPORTATION SERVICES AND CANNOT BE CONSTITUTIONALLY APPLIED TO CONTRACTS OF THE UNITED STATES FOR TRANSPORTATION OF HOUSEHOLD GOODS OF UNITED STATES GOVERNMENT PERSONNEL.

Two separate issues are involved in determining the validity of Georgia's attempt to regulate the price at which the United States can obtain transportation of household goods. First, there is the question whether the federal statutes and regulations which describe the procedures for the procurement of transportation services are inconsistent with Georgia's regulation of the rates of intrastate carriers who are serving the United States. The second issue, which need only be reached if the first is decided against the United States, is whether, even aside from the web of federal directives surrounding government procurement, the Constitution itself forbids Georgia's type of regulation of federal procurement of transportation services. We shall deal first with the issue of federal statutory preclusion of state rate regulation.

Two subsidiary questions are involved in a determination that a certain type of state regulation is precluded by a federal regulatory scheme. First, the court must decide what is the scope and purpose of the applicable federal statutes and regulations. Second, it must determine whether the application of the state law so conflicts with the federal policy

as to warrant requiring the state law to give way. In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, this Court authoritatively determined: (1) the intended scope of almost identical provisions of federal law and (2) the effect upon such federal law of a state scheme of regulated transportation rates like that adopted by Georgia. The Court concluded that "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" was "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve." 355 U.S. at 544. The same result is required here.

A. FEDERAL POLICY RELATING TO THE PROCUREMENT OF TRANSPORTATION SERVICES

The similarity between the federal statutory provisions and regulations applicable to the present case and those applicable in *Public Utilities Commission of California, supra,* can best be indicated by describing each in sequence.

1. The Federal statutory and regulatory scheme presented in Public Utilities Commission of California v. United States, 355 U.S. 534

In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, this Court ruled that the interlocking federal statutes and regulations governing federal procurement of transportation services were intended to be, not merely a set of recommended procedures for federal officials to employ within the context of State customs and laws, but a pervasive

and uniform procedural framework for the federal purchase of goods and services regardless of conflicting State laws. The Court's conclusion is developed at 355 U.S. 540–543.

The Court first stated that in the controlling statutes "Congress has provided a comprehensive policy governing procurement" (at 540) with competitive bidding the general rule and negotiated purchase or contract the exception to be available in several enumerated situations. In the more specific regulations "promulgated to carry out these statutory provisions" (at 542) in the field of transportation, the Court noted three indications that the federal procurement procedures were intended to provide an exclusive framework for the negotiation of rates without regard to State law: (1) provision for the careful determination of the reasonableness of current rates for the government's "volume shipments" and, "when appropriate, for negotiation of adjusted or modified rates"; (2) declarations that the least costly adequate means of transportation will be chosen; and (3) stipulations requiring negotiation for lower or more equitable rates whenever currently effective rates were determined to be unreasonable or excessive.

From these indications of a comprehensive regulatory scheme directed at obtaining transportation at the lowest available cost by means of review of the reasonableness of existing rates and negotiation to obtain modification of excessive rates (for example, to force recognition of the cost savings of the govern-

ment's large-volume shipments), the Court concluded that (355 U.S. at 542–543):

> It seems clear that these regulations—which have the force of law, *Leslie Miller, Inc.*, v. *Arkansas*, 352 U.S. 187; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481—sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiations for lower rates will be undertaken.

Obviously, "negotiations for lower rates" implies rates arrived at without regard to State law.

2. *The federal statutes and regulations now applicable to shipments of household goods by the United States*

(a) Military procurement law

The statutes in effect at the time of the *Public Utilities Commission of California* case are still the basic provisions for all procurement of supplies and services by the armed services[12] and, as we shall show, the underlying regulations are also substantially the same. See 70A Stat. 127–133, 10 U.S.C. 2301–2314.[13] The statutes contemplate that most contracts will be placed by competitive bidding, in which event the award is to be granted "to the responsible bidder whose bid * * * will be the most advantageous to the

[12] The armed services carry out statutory responsibilities to transport (or pay for the transportation of) the household effects of permanently transferred military personnel and civilian employees of the Defense agencies (R. 36; 5 U.S.C. 73b–1(a); 37 U.S.C. 253(c), App. B, pp. 71–72). In terms, the armed services procurement provisions cover the procurement of "all services" for which the armed services are responsible (10 U.S.C. 2303(a)).

[13] See also, *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484.

United States, price and other factors considered." 10 U.S.C. 2305(c), App. B, p. 73. Procurement may also be carried out by negotiation without advertising in various situations including, among others, where the public exigency will not allow delay, where it is impracticable to obtain competition and where bid prices are determined to be unreasonable or not to have been reached independently in open competition. 10 U.S.C. 2304(a)(2) (10), (15), App. B, p. 72;[14] see *Public Utilities Commission of California* v. *United States*, 355 U.S. at 540–541 and n. 3; S. Rep. No. 571, 80th Cong., 1st Sess., pp. 2, 3–4, 13; H. Rep. No. 109, 80th Cong., 1st Sess., pp. 3, 6.

These statutes and the regulations thereunder apply not only to the carriage of property owned by the government but also to the transportation of the household effects of government personnel.

The Army, Navy and Air Force regulations involved in *Public Utilities Commission of California* were superseded in March 1958 by the Military Traffic Management Regulation (App. B, pp. 76–81),[15] but

[14] As stated in the Senate Report on the Armed Services Procurement Act of 1947, the purpose of the latter provision was "to break collusive bidding, follow-the-leader pricing, rotated low bids, identical bids requiring drawing of lots, uniform estimating systems, refusal to classify the Government as other than a retail buyer regardless of the quantity purchased, and similar practices." S. Rep. No. 571, 80th Cong., 1st Sess., p. 4. The present military procurement statute is a recodification, without substantial change, of the Armed Services Procurement Act of 1947. See S. Rep. No. 2484, 84th Cong., 2d Sess., pp. 19, 20–21.

[15] The regulation was promulgated by orders of the Secretaries of the Army (AR 55-355), Navy (OPNAV INST 4600.8), and Air Force (AFM 75-2). The heads of the Defense

their substance, so far as now relevant, is unchanged. The expressed purpose of the new regulation is to provide policy guidance as to traffic management "functions regarding the effective and economical procurement and use of commercial freight and passenger transportation service by the military" (¶10100I, App. B, p. 76). It further states, in language almost identical to that of an Army regulation cited in *Public Utilities Commission of California* v. *United States*, 355 U.S. at 542, "In the selection of commercial carriers, the means of transportation selected will be that which produces the lowest overall cost consistent with military requirements, the objectives of governing procurement regulations and the transportation policies as expressed by Congress * * *, contingent upon carrier ability to provide safe, adequate, and efficient transportation" (¶102003, App. B, p. 77).

To effectuate these policies the regulation authorizes the Executive Director of the Military Traffic Management Agency ("MTMA") [16] to determine the

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Department and the other departments comprising the Defense establishment are statutorily authorized to prescribe regulations to carry out their duties. 5 U.S.C. 22 (Secretary of Defense); 10 U.S.C. 3012(g) (Secretary of the Army), 6011 (Secretary of the Navy), 8012(f) (Secretary of the Air Force).

[16] The establishment of the MTMA was authorized by the Department of Defense on May 1, 1956, to coordinate the traffic management functions of all three services, in order "[t]o provide the most effective and economical freight and passenger transportation service for the Armed Services from commercial transportation companies." DOD Directive No. 5160.14, 21 Fed. Reg. 4355. The Defense Traffic Management Service succeeded to the functions of MTMA on January

"proper freight classification, rates, charges, rules and regulations on military traffic," to negotiate with carriers or their rate-making agencies as to "rates" and "charges" (¶201001 (a), (b), App. B, p. 77), and to receive all voluntary or negotiated rate tenders relative to "[a]djustment of tariff provisions" and "[s]pecial arrangements pertaining to other freight traffic" (¶201001(k) (6), (7), App. B, p. 78). Local transportation officials are ordered to "be constantly alert to identify opportunities for rate negotiations" in situations where the government will pay the transportation charges of a "planned volume movement" (¶201005, App. B, p. 78), and are to transmit to the Executive Director certain specified information on any shipment as to which they believe the "rating is unreasonable" (¶201006(2), App. B, p. 79), so that negotiations for a revision can commence.[1]

Thus the new Military Traffic Management Regulation continues in effect the provisions of the former Army, Navy, and Air Force Regulations designed to assure the lowest possible overall cost by bringing the technique of negotiation to bear whenever either the volume of the government shipment or a review of the reasonableness of applicable rates indicates to the responsible government official that these rates are excessive. The effectuation of this purpose may be observed even more clearly in the regulations designed

1, 1962, and presently performs traffic management functions for all three services. DOD Directive No. 5105.22, November 6, 1961.

[1] Compare the similar Navy and Air Force regulations cited in *Public Utilities Commission of California* v. *United States*, 355 U.S. at 542.

specifically to govern the movement of household goods.

Two basic documents embody the controlling provisions for this type of shipment. Department of Defense Directive No. 4500.27, July 1, 1960 (R. 38–47), was intended "to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government" (R. 39). The directive provides that "[o]nly those carriers shall be used" which satisfy certain enumerated requirements "at the lowest over-all cost to the Government" (R. 41). It directs implementation by the fixing of "standards, formulae, and procedures for determining the lowest over-all cost" (R. 44) and by "[n]egotiating with commercial carriers and operators on all matters incident to the transportation of household goods" (R. 45).

Chapter 217 of the Military Traffic Management Regulation also deals specifically with movements of "uncrated household goods of military and civilian personnel of the Department of Defense * * * when the transportation is procured and arranged by an agency of the Department of Defense" (¶217001, App. B, p. 80).[18] The Executive Director of MTMA

[18] Insofar as the military regulations deal with transportation of household goods of civilian employees (as distinguished from military personnel), they represent the Defense Department's implementation of the governing regulations of the Bureau of the Budget which are described more fully in the discussion of nondefense procurement, *infra*, pp. 40–43. Chapter 217, as dated August 19, 1960, was in effect at the time of the proceeding in the court below. The present chap-

is made responsible, *inter alia*, for "[a]ccepting tenders of service from commercial carriers of household goods, reviewing such tenders and approving or disapproving carriers for use by military installations," and "[n]egotiating special tenders, agreements, or arrangements with commercial carriers for the movement of household goods" (¶217004(e), (f), App. B, p. 81). Provision is made for "[s]pecial tenders of rates or charges, either of individual carriers or tariff publishing agents" (¶217010, App. B, p. 81). Finally, under "Distribution of Traffic and Selection of Carrier" the chapter states, "Only those carriers shall be used which provide high quality service at the lowest overall cost to the Government" (¶217012, App. B, p. 81).

(b) Procurement by non-defense agencies

The same "policy of negotiating rates for shipment of federal property" and of entrusting "the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken" which the Court observed in the *California Commission* case (355 U.S. at 543), and which has been continued in the statutes and regulations dealing with military shipments, emerges with equal clarity from a review of the federal statutes and regulations governing procurement by non-defense agencies. Again, as in the case of military shipments, the regulations emphasize the objectives of volume savings and modifying rates which the

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ter, as amended to date February 23, 1962, is not significantly changed.

elements of federal policy which led the Court in the

procurement agency deems unreasonable, by negotiation as well as by competitive bidding. It was these *Public Utilities Commission of California* case to hold that the federal provisions furnished a comprehensive and exclusive framework for the procurement of transportation services.

Procurement by non-defense agencies, insofar as here pertinent, is carried out under the authority of the General Services Administration. The basic statutory provisions are in the Federal Property and Administrative Services Act of 1949, 63 Stat. 393–397, as amended, 41 U.S.C. 251–260. They are substantially similar to the military procurement provisions discussed *supra*, pp. 32–33, and were, in fact enacted to extend to GSA "the principles of the Armed Services Procurement Act of 1947, with appropriate modifications principally designed to eliminate provisions applicable primarily to the military." H. Rep. No. 670, 81st Cong., 1st Sess., pp. 6, 20; S. Rep. No. 475, 81st Cong., 1st Sess., p. 5.[19]

[19] Thus, under the Federal Property and Administrative Services Act of 1949, as under the armed services procurement provisions, advertising for bids is the general practice, and contracts are to be awarded "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered." 41 U.S.C. 253(b), App. B, p. 74. Negotiation is also authorized in various instances, including where the public exigency will not admit of delay, where it is impracticable to obtain competition and where bid prices received are not reasonable or have not been independently arrived at in open competition. 41 U.S.C. 252(c)(2), (10), (14), App. B, pp. 73–74; see S. Rep. No. 475, 81st Cong., 1st Sess., p. 24. The authority to negotiate where it is impracticable to obtain competition "places upon the agency concerned the maximum responsibility for decisions as to when it is impracticable. It

Acting pursuant to his authority to "prescribe such regulations as he deems necessary to effectuate his functions" (40 U.S.C. 486(c)), the General Services Administrator has promulgated numerous regulations dealing with procurement, including specific provisions relating to the transportation of household goods. He has delegated authority to administer and formulate policies for procurement of transportation services to GSA's Transportation and Public Utilities Service ("TPUS"), including specific responsibility (ADM 5450.3, Change 4, ¶41, App. B, p. 83; emphasis added):

> for the representation of executive agencies in negotiations of rates and contracts for transportation * * * services * * *; for the provision of technical advice and assistance to GSA and other executive agency contracting officers in the development and use of transportation terms and conditions for inclusion in invitations to bid and contracts for supplies and equipment, and *in the furnishing of transportation cost data for use in the evaluation of bids; and for the negotiation with carriers and carrier committees for fair and reasonable transportation rates*, storage-in-transit agreements, and rules and regulations pertaining to volume movements of executive agencies.

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is intended that this paragraph should be construed liberally." H. Rept. No. 670, 81st Cong., 1st Sess., p. 22.

The statute applies to all procurement of property or services by GSA, for its own use or otherwise, and to procurement by other executive agencies which have received delegated authority from GSA (not including agencies subject to armed forces procurement regulations). 41 U.S.C. 252(a).

More specifically, GSA carries out the government's statutory responsibility of transporting, or paying for the transportation of, the household goods of civilian personnel of nondefense agencies who are permanently transferred from one duty station to another (5 U.S.C. 73b–1(a)), App. B, pp. 71–72). The basic implementing regulations under this statute have been promulgated by the Bureau of the Budget (R. 67–73)[20] and provide for two alternative means of carrying out this statutory obligation: (1) the "commuted rate system" by which government employees make their own arrangements for transporting household goods and personal effects, and are reimbursed by the United States pursuant to a schedule of prescribed rates; (2) use of government bills of lading, under which the United States "assumes responsibility for dealings with carriers, including negotiating rates, selecting carriers, and auditing and paying transportation vouchers" (R. 71).

Since it is the latter method of carrying out the statutory duties of GSA which alone is pertinent to the present case, only the regulations dealing with the use of government bills of lading must be evalu-

[20] The pertinent regulations are in Bureau of the Budget Transmittal Memorandum No. 4, February 20, 1960 (R. 67–73), which amended Bureau of the Budget Circular No. A–37, December 30, 1957, App. B, p. 75. The President's authority under 5 U.S.C. 73b–1 to promulgate implementing regulations was delegated to the Bureau of the Budget (Executive Order 10530, 3 CFR 189–190 (1954–1958), App. B, p. 75). Like the underlying statute, the Budget Bureau regulations apply to all civilian employees of the government, including those of the defense agencies, procurement for which is handled by the defense agencies (see note 22, p. 42).

ated in terms of a policy of the use of competitive bidding or negotiation to realize cost savings where prevailing rates are unreasonable or fail to reflect volume savings.

The regulations provide that, because of the additional expense, government bills of lading are to be used for shipping household goods and personal effects "only when actual transportation charges will be substantially below the amounts which the Government would be required to pay under the commuted rate system" (R. 71). They include criteria by which to determine when there is such a substantial advantage and, significantly, make solicitation of lower rates mandatory in certain circumstances. Thus, if a group of employees with household goods aggregating 50,000 pounds or more is to be moved between the same two points within one year, "an effort *shall* be made to obtain favorable transportation rates under the GBL [government bill of lading] method." (R. 71; emphasis added.) In addition, an agency "may in its discretion seek favorable rates" for movements of this volume during a period of more than one year "if it believes there is reasonable opportunity for substantial savings" (R. 71). If a saving of ten percent will result from shipment under a government bill of lading, that method "shall be used" (R. 71–72).[21]

The Budget Bureau regulation also describes certain procedures by which GSA shall assist civilian

[21] In the case of the shipments which gave rise to the present litigation, the cost savings would have amounted to about 66⅔%. *Supra*, p. 6.

agencies in seeking "favorable transportation rates" (R. 72).[22] These have been implemented by GSA in regulation TPS 7460.1 (R. 51–66)[23] which sets forth detailed procedures to be followed by TPUS in "handling mass movements of household goods and personal effects of employees of civilian agencies, upon transfer of official station within the continental United States" (R. 51). The stated objective of this regulation is "to evaluate mass movements of household goods and personal effects and, when feasible, to negotiate with carriers to effect the most economical basis for the movement of such household goods and personal effects" (*ibid.*).

TPUS is directed to evaluate for civilian agencies proposed mass movements (as defined by the Budget Bureau criteria) of household goods and personal effects between two official stations and to determine whether "savings to the Government * * * may result from arranging with carriers for rates for a mass movement" (R. 56). If so, TPUS "shall request eligible carriers to submit rate offers or bids" (*ibid.*), by formal advertising or negotiation. Under either method, "[c]arriers shall be requested to furnish rate offers or bids on the basis of a single rate per 100 pounds to cover *all* of the services which the carrier would be required to perform under the specifications to provide the owner of the property with a complete

[22] The Budget Bureau regulation directs the Department of Defense to carry out the same responsibilities for its civilian employees (R. 67–68, 73), which has been done through the military procurement regulations described *supra*, pp. 34–37.

[23] TPS 7460.1 is set out in the record, and here cited, as promulgated on March 15, 1960.

moving service" (R. 57; emphasis in original; see Specifications, R. 62-63). The resulting estimated cost is furnished by TPUS to the interested civilian agency and, if the latter determines that a mass movement on government bill of lading "will be advantageous to the Government," a contract for such mass movement "must be entered into between the carrier and the United States Government" (R. 58).

It is thus clear that the federal statutory and regulatory procedures for the transportation of household goods belonging to personnel of nondefense agencies, like military procurement—"sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken."[24] In fact the GSA regulations go well beyond sanctioning negotiation for rates lower than those generally applicable and *direct* that, in certain situations, procurement officials *shall* solicit lower rates reflecting the volume of government shipping (R. 71; see also R. 56).

B. THE CONFLICT OF GEORGIA'S RATE REGULATION WITH FEDERAL POLICY RELATING TO THE PROCUREMENT OF TRANSPORTATION SERVICES

The Georgia Motor Vehicle Code provides that the Georgia Public Service Commission "shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers,

[24] *Public Utilities Commission of California* v. *United States*, 355 U.S. at 543.

baggage and property" (Ga. Code Ann. 68–613, App. A, p. 69), and it prohibits both carriers and shippers from deviating or seeking a deviation from the prescribed rates (Ga. Code Ann. 68–614, App. A, p. 69). The Georgia tariff also explicitly prohibits the very "mass movements" of household goods at a reduced volume rate which are prescribed by the Budget Bureau regulations and the implementing directives of GSA and the Defense Department, for it provides that "[p]roperty of two or more families or establishments will not be accepted for transportation as a single shipment."[25] And as the record in this case shows (R. 13, 17–18), the Georgia Commission asserts that a carrier may lose its certificate by deviating from the state tariff in bidding for a United States government contract whether or not any goods are carried pursuant to the bid.

The conflict between this system of state rate regulation and the federal procurement scheme is clear beyond dispute. The federal scheme entrusts "procurement officers with the discretion to determine when existing rates will be accepted" (355 U.S. at 543); it requires solicitation of lower rates when, in the opinion of the appropriate procurement officer, the applicable transportation rate is unreasonable; and it provides in careful detail for using public bidding and negotiation to obtain favored treatment in situations where these methods are justified by the volume of the government's shipment. The Georgia statute seeks to prevent federal procurement officers,

[25] Georgia Household Goods Tariff No. 1-B, MF No. 3, Section I, Rule 15, App. C, *infra*, p. 85.

acting for the United States as shipper, from complying with these duties; it forbids them to solicit a departure from a rate required by Georgia law. And quite apart from this prohibition of solicitation of lower rates, negotiation and public bidding become meaningless if any local carrier that even bids a rate below the established tariff is to be deprived of his license by the State Commission. It is no less plain that applying to government shipments the Georgia prohibition of mass shipments of the property of more than one family would wholly defeat the federal regulations requiring bidding and negotiation to insure that the government enjoys the benefits of volume purchases of transportation.

In sum, the Georgia statute and tariff appear to be designed for the specific purpose of preventing the federal procurement agencies from obtaining the very benefits the federal statutes and regulations are designed to achieve. But if the purpose is not so specific, certainly the policy of Georgia's regulatory scheme is designed to deprive all large shippers of the benefits of competition, whereas the federal procurement statutes, as the Senate Report on the Procurement Act of 1947 indicates,[28] were intended to secure "the benefits of competition" and to protect the United States against "refusal to classify the Government as other than a retail buyer regardless of the quantity purchased." The conflict of policies is complete, and pervasive in its effects.

The present case thus presents the same ultimate question that was resolved in *Public Utilities Com-*

[28] S. Rep. No. 571, 80th Cong., 1st Sess., p. 4.

mission of California v. *United States*, 355 U.S. 534, 542–543, and in an almost identical legal context:

> It seems clear that these regulations * * * sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken. It also seems clear that under § 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement.

We submit that here, as in that case, the conflict between federal and state law is "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve." *Public Utilities Commission of California* v. *United States*, 355 U.S. at 544. Indeed, in a sense the conflict here is even more pronounced than the "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" which was so "clear" in the *California Commission* case. For in the latter case, the California agency was authorized to permit the United States to obtain reduced rates. Georgia law makes no such allowance.[27]

[27] See also *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187, striking down the application of state licensing requirements to contractors for the United States as conflicting with federal statutes and regulations authorizing awards to the lowest responsible bidder and establishing criteria for the selection of

In sustaining Georgia's rate regulation the district court relied upon this Court's earlier decision in *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, and an asserted distinction between the transportation of household goods of government personnel in this case or the purchase of milk in *Penn Dairies*, and the "unique and difficult problems" of the military traffic involved in *Public Utilities Commission of California* (R. 100). While this distinction may be pertinent to the question whether the State has unconstitutionally burdened the exercise by the United States of constitutional powers, discussed *infra*, pp. 51–68, it is irrelevent to decision of the present issue—whether the State regulation conflicts with valid federal law. There is no doubt that the United States may regulate the procurement of its contracts and that it has done so with respect to transportation of household goods. Once this is shown, and it is established that a conflict exists between federal and State regulation of the same subject matter, "the policy of the State must yield." *Franklin National Bank* v. *New York*, 347 U.S. 373, 374; *Mayo* v. *United States*, 319 U.S. 441, 445.

The district court's reliance on the *Penn Dairies* case was misplaced. The fundamental distinction between *Penn Dairies* and this Court's later decision in *Public Utilities Commission of California* v. *United States*, *supra*, is their differing resolutions of the issue

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contractors: *Franklin National Bank* v. *New York*, 347 U.S. 373, invalidating a State statute forbidding national banks to use the word "saving(s)" in their business or advertising as conflicting with federal laws authorizing national banks to receive savings deposits.

of the conflict between federal statutory policy and State law. In *Penn Dairies*, the Court analyzed the early procurement statutes and regulations there applicable, and found no conflict with Pennsylvania's laws fixing the price of milk sold to the government (318 U.S. at 271–278). In contrast, the explicit ground of decision in *Public Utilities Commission of California* was that, upon examination of the Armed Services Procurement Act of 1947 and the regulations applicable to procurement of transportation services which had been issued thereunder, there was a square "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" (355 U.S. at 544).

Between the dates of the two decisions Congress had passed what the House of Representatives report called "a comprehensive revision and restatement of the laws governing the procurement of supplies and services." H. Rep. No. 109, 80th Cong., 1st Sess., p. 6. See also S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. The regulations issued under the Procurement Act of 1947 greatly elaborated the federal policy of free contracting, effectuated through bidding and negotiation, to assure the United States of obtaining the goods or services it needed at the lowest overall price—at a price that reflected the volume of purchases by the United States rather than arbitrarily classifying the federal government as "a retail buyer regardless of the quantity purchased." S. Rep. No. 571, 80th Cong., 1st Sess., p. 4. As is shown by a comparison of the regulations set out in *Penn Dairies*, 318 U.S. at 275–278, with the regulations in *Public*

Utilities Commission of California, 355 U.S. at 542-543, the determinations of federal policy in the two cases involved consideration of two quite different regulatory schemes and could, entirely consistently, result in differing conclusions. It is this difference, and not a difference in the articles purchased by the United States, which provides the basic distinction between the two cases on the issue of federal regulatory preclusion of conflicting State laws.

Except for the court below in this case, the lower courts have uniformly understood that this Court's holding in *California Commission* as to the import of federal procurement policy, and its supremacy over State regulation, did not depend upon the nature of the commodities involved. Thus, on the precise issue in this case, the Supreme Court of Florida held, in *United States* v. *Carter*, 121 So. 2d 433, that Florida statutes "which expressly prohibit any discrimination in rates and charges made by common carriers" (p. 435) would be unconstitutional if utilized to fix the rates at which the federal government could move household goods of government personnel. The court expressly rejected the argument that *California Commission* was distinguishable because it involved military supplies, stating (121 So. 2d at 437):

> In both instances the property is being moved by the federal government in the fulfillment of its required responsibility to provide for the national defense. * * * Congress, by statutory enactment, has made provision for the transportation of [servicemen's] household goods at government expense. The regulations promulgated pursuant to this statutory authorization

> have stipulated the procedures for carrying out this policy. These regulations have the force and effect of law. * * * In moving both types of property the federal government is acting in the interest of all the people of the country. * * * It is our conclusion that the respondent Commission's application of the Florida Statutes is precluded by the supremacy clause of the Article VI and that the acts of Congress enacted pursuant thereto supersede the state statutes when related to the instant transactions.

In other lower court cases the *California Commission* decision has been applied to invalidate State regulation of government procurement of transportation services for the United States generally (*Railroad Commission of Texas* v. *United States*, 159 Tex. 197, 202, 317 S.W. 2d 927, 930), of electricity (*Arkansas Power & Light Co.* v. *Arkansas Public Service Commission*, 231 Ark. 142, 147–148, 330 S.W. 2d 51, 54) and of milk (*United States* v. *Warne*, 190 F. Supp. 645, 654–657 (N.D. Cal.), pending on appeal, *sub nom. Paul* v. *United States*, No. 19, this Term), as well as of military supplies. *Alabama Hwy. Express, Inc.* v. *United States*, 175 F. Supp. 143, 146 (Ct. Cl.); *Bouton Rapid Express, Inc.* v. *United States*, 171 F. Supp. 868, 872 (Ct. Cl.); *Union Transfer Co.* v. *United States*, 168 F. Supp. 217, 218 (Ct. Cl.); *Hughes Transportation, Inc.* v. *United States*, 168 F. Supp. 219, 220 (Ct. Cl.); *United States* v. *Pennsylvania Public Utilities Commission*, 393 Pa. 537, 541, 143 A. 2d 341, certiorari denied, 358 U.S. 884.

TO APPLY THE GEORGIA RATE REGULATION TO THE TRANSPORTATION CONTRACTS OF THE UNITED STATES WOULD DIRECTLY, AND THEREFORE UNCONSTITUTIONALLY, REGULATE AND BURDEN THE OPERATIONS OF THE FEDERAL GOVERNMENT

The complaint alleged that, quite apart from the federal statutes and regulations, the Georgia rate regulation is unconstitutional because it violates the United States' inherent constitutional immunity from State regulation (R. 5). In analyzing this claim, which we earnestly renew, it is essential to observe the exact limits of the constitutional question. The United States indubitably has some degree of sovereign immunity from both State taxation and State regulation as an "unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436. Congress may define its operative limits, either by waiving any part of the immunity that would otherwise exist (see *Mayo* v. *United States*, 319 U.S. 441, 448), or by ousting State-imposed burdens that unduly hamper the effectuation of federal policies (*Federal Land Bank* v. *Kiowa County*, 368 U.S. 146, 149 and cases cited). When neither Congress nor its authorized delegates in the executive branch have spoken, as we now assume to be the case, it is for the Court to determine what rule shall prevail until Congress expresses a policy. The task is not unlike that of determining how far a State may regulate or tax interstate commerce in the silence of Congress.

Two rules for dealing with this situation have come to be settled:

First, a State may not directly regulate or tax the property, instrumentalities or activities of the United States. *Johnson* v. *Maryland*, 254 U.S. 51; *Arizona* v. *California*, 283 U.S. 423; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Mayo* v. *United States*, 319 U.S. 441; see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, 269; *United States* v. *City of Detroit*, 355 U.S. 466, 469.

Second, the fact that nondiscriminatory State taxation or regulation of one doing business with the federal government imposes an increased economic burden upon the United States is not alone enough to give the contractor immunity from the taxation or regulation. *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Alabama* v. *King & Boozer*, 314 U.S. 1; *United States* v. *City of Detroit*, 355 U.S. 466; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94; *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261.

While the boundary dividing the spheres of application of each of these rules may not be clear in every case, one subsidiary proposition is both easily applied and firmly established. A State may neither address a command to nor impose a tax upon the agents and officers of the United States when they are acting in the course of their Constitutional powers. This proposition in itself determines the present case, for the Georgia statutes are, on their face, a direct regulation addressed to the federal government as a shipper. The rates are fixed by the Public Service Commission and to receive "a greater or less or

different compensation for the transportation" is a violation of Georgia Code Chapter 68–6. See Ga. Code Ann. 68–614. All shippers, including federal officers and employees, are prohibited from seeking a different rate by Section 9911 of the same chapter which provides—

> Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68–6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

Misdemeanors are punishable by fine or imprisonment. Ga. Code Ann. 27–2506. Thus, here as in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 538, "If a United States officer were to negotiate with a carrier for 'reduced rates' * * * he could be thrown into the county jail." This circumstance distinguishes *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, 277 where, as the case came before the Court, the State regulation imposed no prohibition on the federal government or its officers; they, Mr. Chief Justice Stone said, "may purchase milk from whom and at what price they will, without incurring any penalty" (318 U.S. at 270).[27a]

[27a] The district court below was mistaken in its belief (R. 97) that the Pennsylvania law involved in *Penn Dairies* imposed criminal penalties upon all purchasers as well as sellers of milk at other than the prescribed prices. Pennsylvania's Milk Control Act, as enacted in 1937, made it a crime "for a milk dealer or producer"—not for others—to buy or sell milk, or offer to do so, at other than the prescribed prices (Section 807, Pa. Laws 1937, Vol. I, pp. 446–447). This was the state statute at issue in *Penn*

We do not stand upon that ground alone. Defining the boundary line between direct regulation or taxation of the United States and taxation or regulation of one doing business with the United States involves recognition of the fact that a State may attempt to tax or regulate the activities of the federal government without verbally addressing its commands to a class including the United States or its agents. It is the activities of the United States and not merely its agents that must be free from State interference. Included among those activities is the federal government's exercise of its powers to contract. Accordingly, we submit that a State may not regulate the terms of a transaction by which the United States obtains services or supplies.[28]

This proposition may be fitted into the basic principles stated above in either of two ways. One formulation would recognize that in determining whether an attempted State regulation of the terms of a con-

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Dairies, and it clearly did not threaten federal procurement officials (see brief for the appellants in No. 399, O.T. 1942, pp. 12, 48).

The district court erroneously cited Section 807 in its present form (31 Pa. Stat. Ann. [Purdon's] Sec. 700 j–807), which imposes criminal sanctions upon "any person" who buys or receives milk, or offers to do so, at other than prescribed prices. The law was amended to this form in July, 1941, during the course of the *Penn Dairies* litigation, but the amended Form was not directly involved in that case. See brief for the appellants in No. 399, O.T. 1942, pp. 12–13.

[28] In *United States and Olin Mathieson Chemical Corp.* v. *Department of Revenue of the State of Illinois*, No. 235, this Term, Jurisdictional Statement filed July, 1962, challenging the constitutionality of an Illinois tax upon sales made to the United States, we deal with the parallel tax aspects of this question.

tract is a "direct" regulation of the United States, it is immaterial whether the regulation of the terms of a contract involves the addressing of a command to some class of which federal officials are members or takes the form of a prohibition on the activities of all sellers of goods or services. In determining what is "direct," in defining the immunity, this Court "goes beyond the bare face of the taxing statute or consider all relevant circumstances." *United States* v. *City of Detroit*, 355 U.S. 466, 469. And to regulate the terms of transactions into which any contractor may enter is, inevitably and directly, to regulate the government itself.

Alternatively, one might reserve the first principle—banning direct taxation and regulation of the United States, its property and activities—for cases in which the legislation is addressed *in haec verba* to the United States or a class of which it is a member. In that event, that principle and the rule denying immunity merely because of an indirect economic burden do not form a dichotomy dividing the universe, but leave room for a third class of cases in which the State statute, although not formally addressed to the United States or its agents, nevertheless imposes more than the kind of indirect economic burden with which the latter rule is concerned. The present case would then fall within the intermediate area, to be governed by a separate rule exempting the contracts of the United States from *direct* regulation without regard to the form of words.

In either event, the immunity is supported both by the prior decisions of this Court and by the

reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself. Under one approach these are reasons for bringing the case within the phrase "direct regulation of the United States," for the rules should cover the cases within its reasons. Under the other approach, they support the recognition of an immunity from direct regulation of the terms of government contracts in addition to the immunity from direct regulatory or tax laws addressed to the United States.

A. THE PRECEDENTS

In *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42, Mr. Justice Bradley drew the governing distinction and plainly stated the rule that government contracts are not subject to taxation or regulation by a State:

> The case differs *toto cœlo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and *the contract* alone, and not the contractor, *is exempt from*

taxation or other interference by the State government. (Emphasis supplied.)

This passage was quoted by the Court with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155. See also the separate opinion of Mr. Justice Frankfurter in *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495, 498.

The doctrine was squarely applied in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, where this Court held that an Arkansas sales tax could not constitutionally be applied to sales to the federal government because the government's sovereign immunity had not been waived. The Arkansas law imposed an excise tax of two percent upon the gross receipts of all sales; the tax was to be paid to the State by the seller who, in turn, was required to collect it from the purchaser. Arkansas attempted to collect the tax upon a sale of tractors to be used in constructing a naval depot for the United States under a cost-plus-fixed-fee contract. Arkansas asserted that the sale was to the contractor and was therefore taxable regardless of the incidence of the ultimate economic burden. Cf. *Alabama* v. *King & Boozer*, 314 U.S. 1. The United States and the contractor replied that the purchaser under the contract was the United States. The Court, agreeing that the United States was the purchaser, pointed out that its decisions "consistently prohibit taxes levied on the property or purchases of the Government itself" (347 U.S. at 123), and held that the application of the tax to the sale to the United States violated its constitutional immunity from State taxation even though the seller was the only formal addressee of the statutory command. The dissenting justices concluded that

the contractor was the real purchaser but did not dispute the basic proposition that sovereign immunity exempts the United States from "taxes levied on the * * * purchases of the Government itself." (347 U.S. at 123.)

There is no ground that would benefit appellees for distinguishing between a State law imposing a tax upon sales which the seller is required to collect from the buyer and a State law fixing the price which the seller is required to collect. If there be a difference, the regulation is the more obnoxious because it restricts the manner in which governmental activities can be conducted. See pp. 60–62 below. And surely no line can be drawn between a sale of goods and a contract for transportation.

B. THE REASONS

The three dominant reasons for the immunity of the United States from direct State regulation or taxation of its officers or property, also support the proposition that a State may not directly regulate the terms of its contracts.

(1) It is inherent in the concept of sovereignty that neither the United States nor a State should assert the right to regulate or tax the activities of the other while confined to its constitutional orbit. The alternative is unseemly and harassing conflict. In the present case Georgia has frankly asserted the power to dictate the price term in contracts of the United States for transportation of household goods. The services which the United States seeks to purchase—Georgia intrastate shipments of household goods—can, by Georgia statute, be purchased only from

carriers who are subject to the provisions of the Georgia tariff. And these carriers are forbidden to accept the property of two or more families of government employees as a single shipment or to accept a rate below the minimum set by the Georgia Public Service Commission. Regulation of the services that may be rendered by any possible seller of the transportation service needed by the federal government *is* regulation of the services it can purchase. Regulation of the rate to be charged by the carrier *is* regulation of the compensation to be paid by the shipper. Indeed, regulation of the terms which private persons may put into contracts with the United States *is* regulation of the terms which the United States may put into contracts with private persons. A contract is an integral relationship between two persons; it makes no difference whether its terms be prescribed from one side or the other.

These truths are expressly recognized in the Georgia statute which makes it a crime for federal officers, as shippers, to seek lower or different rates than those specified in the published tariff (see *supra*, pp. 52–53), but the omission of all express references to shippers would not reduce the unseemly intergovernmental conflict.

(2) A second reason for the immunity of the federal government from direct regulation of the activities of its officers and employees is the danger that, wholly aside from any increased economic burden, the application of such State laws would obstruct the United States in the attainment of constitutional purposes. The Court has stated in the broadest terms

that the federal government's dealings with independent contractors are immune from State laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U.S. at 157, 161), "handicap efforts to carry out the plans of the United States" (*James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 104), or "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U.S. 111, 115). See *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. And this reason for sovereign immunity is also applicable to regulation of the contracts of the United States.

The degree of actual interference will vary from instance to instance. In the present case, it seems clear that more than an increase in cost will be involved if carriers employed by the United States are forced to comply with Georgia law for intrastate transportation of household goods under government contract. As Colonel Higgins, the director of traffic for the Military Traffic Management Agency, stated in an affidavit below, the application of State law would not only increase the expense to the federal government but would also bring "attendant confusion" and "possible delays" (R. 9). Federal agencies would no longer be able to administer a uniform system of procurement applicable to transportation services throughout the country. Instead, they would have one system covering shipments of household goods which cross State lines (or are within those States not seeking to regulate them), and, depending upon State legislatures, up to 50 systems governing

intrastate shipments.[*] Since even single mass transfers can combine interstate and intrastate shipments of household goods, federal officials would have to separate these and comply with separate sets of procedures and rate standards. A State law like Georgia's, which forbids combining the household goods of two or more families as a single shipment would multiply the difficulties in the appraisal of goods and the negotiation and settlement of contracts, as would a State law requiring separate charges for each of the services connected with the shipment of household goods. Compare the General Services Administration regulation set out at pp. 42–43, *supra*. These problems in handling their household goods would often complicate and delay the transfer of government employees to new locations (see R. 36), thus aggravating the interference with federal operations.

In other situations still greater practical interference with the operations of the federal government would follow upon State regulation of the terms of the contracts under which government goods could be carried. The difficulties in the case of military equipment, for example, are graphically described in the case of *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 544–546, and need not be repeated.

The controlling principle leaves no room for distinctions between different governmental functions,

[*] Colonel Higgins' successor as traffic director of MTMA averred that (R. 37) "if all fifty states were to regulate the rates for the shipment of the household effects of personnel of the Defense Department it would be impossible to carry out or comply with the national procurement statutes and implementing directives."

or for judicial appraisal of the degree of obstruction. Whenever the regulation would directly impinge upon the employees, instrumentalities or activities of the United States, there is immunity in the absence of a Congressional waiver. Whenever the incidence of the statute is upon the contractor's activities incident to performance of the government contract as distinguished from its terms—regulation of the wages he pays his employees or his safety equipment, for example—there is no immunity in the absence of Congressional action no matter how heavy the resulting indirect economic burden may be. This test does not resolve all the difficulties in dealing with intergovernmental immunities, but it achieves sound relationships in most cases and furnishes a workable test.

It is hardly necessary to add that the obstruction of federal activities is the same whether the State attempts to regulate the terms of its contracts in language which speaks of the promises and performance of the government (here the shipper) or of the private contractor (here the carrier). If a State cannot constitutionally forbid the United States from constructing a dam without securing the State's approval of the plans and specifications (*Arizona* v. *California*, 283 U.S. 423, 451–452), it cannot defeat the sovereign exemption by forbidding any contractor to work upon any dam the plans and specifications for which have not been approved.

There are three answers to any suggestion that price and rate regulation must be distinguished from other regulatory State legislation because they place only economic burdens upon the United States. The first answer is that this is not always true, as the

opinion of the Court convincingly demonstrates in *California Commission* v. *United States, supra;* and it is not true in the present case. Second, the thrust of the entire effort to establish workable rules in the field of intergovernmental immunities has been to get away from the appraisal of degrees of burden and to avoid such distinctions as those between a price, a price schedule which affects the kind of service available, and the other terms of performance. Third, the rule that those doing business with the United States cannot claim immunity from non-discriminatory taxation or regulation merely because of a resulting economic burden upon the United States does not mean there is no immunity whenever the only practical impact is economic. Obviously, the practical impact of many non-discriminatory taxes, such as the real property tax, is only economic, yet this Court's decisions "consistently prohibit taxes levied on the property *or purchases of the Government itself.*" *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 123 (emphasis supplied). One aim of the rule is "to keep the contracting governments from putting their hands in each others' pockets." T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation*, p. 128.

(3) This brings us to the third reason for the basic distinction between direct taxation and regulation and mere economic burdens. As the activities and responsibilities of the State and federal governments expanded, it became apparent that the doctrines of intergovernmental immunity exemplified by such decisions as *Gillespie* v. *Oklahoma,* 257 U.S. 501; *New York ex rel. Rogers* v. *Graves,* 299 U.S. 401, and *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, were not

only closing off important sources of revenue but were creating an ever-growing and likely-to-become-odious class of persons who were not required to pay a normal share of the cost of public services because they had some connection with the government. The subsequent decisions holding that "the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government" (*United States* v. *City of Detroit*, 355 U.S. 466, 469) and cutting the implied immunity back to exemption from taxes on the government itself, or its property, instrumentalities or purchases (*e.g. James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466; *Alabama* v. *King & Boozer*, 314 U.S. 1), seem to us to reflect a desire to avoid those evils rather than utter indifference to whether the State and federal governments put their hands into each other's pockets.

When the tax or regulation is levied upon the contractor as distinguished from the United States, its property or its contracts, the incidence of the resulting economic burden is problematical. No one could be sure whether the real beneficiary of the older immunity was the government or the employee or contractor. And while there are some cases in which one can be sure that a tax on the contractor will be borne by the United States, dollar for dollar (*e.g. Alabama* v. *King & Boozer*, 314 U.S. 1),[*] in the generality of

[*] In such cases it is significant that the burden has been voluntarily assumed by the United States in its contract, not imposed upon the federal government by the State.

cases the distribution of the burden is indeterminable; all or part might be absorbed or spread out over other undertakings. In contrast, where the tax is upon the United States, its property or contracts and must be paid by the federal government, recognition of the immunity gives no special privilege to private citizens and the government pays the tax, dollar for dollar. The State which attempts to collect such a tax is attempting to raise revenue from the federal government.

Direct price regulation has the same consequence. Georgia's price regulation fixes the exact sum which must come out of the federal treasury, just like a tax upon federal property (*Van Brocklin* v. *Tennessee*, 117 U.S. 151) or upon the privilege of making the shipments (see *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155). The very aim would seem to be the same as a direct tax—to dip into the federal pocket to increase the return to Georgia's carriers and thereby to acquire the benefits of any improved transportation facilities made available by the increase in income.[31] Free competition, it is thought, may drive prices down to the place where an inadequate return on capital investment is being realized. But once Georgia has regulated the rate to be charged all private users of the State's carrier system, no reduction in return to any or all carriers can result from the entrance into the market of a new customer—the United States—bringing with it a surge of unregu-

[31] While regulation of *maximum* rates could be intended to ensure an equitable distribution of carrier service among all services, this purpose is plainly irrelevant to a regulation of minimum rates.

lated demand. If the State's carriers are operating at full capacity, then to obtain transportation services the United States must offer any carrier a higher net return than that which the carrier could obtain from dealing with private shippers. If the State's carriers are operating at less than full capacity, the addition of the United States' demand for transportation provides additional revenues from the same equipment, which would not be earned if the United States had not chosen to ship within the State. In short, the extension of Georgia's rate regulation to the United States is an attempt by the State to specify the amount of the special benefits it shall enjoy because of the presence of the United States.

We believe that this third element—the direct levy upon the federal treasury—is not only a significant reason for the federal government's immunity from taxes laid upon the United States, its property or contracts but that it is also applicable to the present case. Even if this analysis be rejected, however, the first and second reasons for the constitutional immunity remain, and Georgia lacks power to apply its system of rate regulation to the contracts of carriage negotiated by the United States.

It will be said that this conclusion is contrary to *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261. Two distinctions are at once apparent. First, as noted above, p. 53, the Court there found that "the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty." 318 U.S. at 270. Here, for the national government or an officer to re-

quest a rate differing from the Georgia tariff would be a criminal offense. Second, there, it was not impossible to buy milk for the Pennsylvania encampment in other States, and the Court pointed out that the out-of-State purchases would not be subject to the Pennsylvania law. *Ibid.* It is unnecessary to determine whether Chief Justice Stone was correct under the Pennsylvania statute in differentiating so sharply between regulation of the terms on which the government might buy and the conditions on which contractors might sell. The Court was sharply divided, five to three, and Mr. Justice Murphy, who was in the majority, appears to have been more influenced by the need for a wholesome supply of milk than by any rationale of intergovernmental immunities having general application. In the present case, as we have shown, regulation of the carrier's rates is direct regulation of the government's bills of lading and payments; and therefore the sovereign is constitutionally exempt.

We are not unmindful that the assertion of the implied constitutional exemption may sometimes impair a system of State regulation or have untoward social or economic consequences. For example, after the district court's decision in *Paul* v. *United States*, No. 19, this Term, holding that handlers selling milk to the United States were immune from a California law fixing the prices paid to milk producers as well as those charged the United States, the Executive Branch reviewed the underlying questions of policy and decided not to assert whatever immunity might apply to the producer prices. Such problems ought never to be overlooked, but where the State regula-

tion bears directly upon the United States, its activities or its contracts, it should be left to the policy-making branches of the government to determine whether to waive the sovereign immunity otherwise implied in the Constitution.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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AUGUST 1962.

APPENDIX A

Georgia Statutes

Sections 613 and 614 of the Georgia Motor Vehicle Code, Ga. Code Ann. 68–613, 68–614, provide in pertinent part:

> 68–613. *Commission's powers over rates.*—The Commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, * * *.
>
> 68–614. *No discrimination in rates, service, etc.*—No motor common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares and charges prescribed or approved by order of the Commission; * * *.

Section 9911 of the Georgia Motor Vehicle Code, Ga. Code Ann. 68–9911, and Section 2506 of the Georgia Criminal Code (as amended, 1957), Ga. Code Ann. 27–2506, provide:

> 68–9911. *Motor common carrier regulations, violation of.*—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68–6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

27-2506. *Misdemeanors, how punished.*—Except where otherwise provided, every crime declared to be a misdemeanor shall be punished by a fine not to exceed $1,000, confinement in the county or other jail not to exceed six months, to work on the public works * * * not to exceed 12 months, any one or more of these punishments in the discretion of the trial judge.

APPENDIX B

FEDERAL STATUTORY PROVISIONS

1. The Career Compensation Act of 1949, 63 Stat. 813, as amended, 37 U.S.C. 253(c), states:

> (c) Transportation in kind for dependents on change of station; monetary payment in lieu of transportation; baggage and household effects * * *.
>
> In addition to the [travel and transportation] allowances authorized above, under such conditions and limitations * * * as may be prescribed by the Secretaries concerned, members of the uniformed services when ordered to make a change of permanent station shall be entitled to transportation in kind for dependents or to reimbursement therefor * * *, to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor * * *.

2. The Administrative Expenses Act of 1946, 60 Stat. 806, as amended, 5 U.S.C. 73b-1, provides:

> § 73b-1. Travel expenses of transferred employees; transportation of families; household goods and personal effects * * *.
>
> (a) Under such regulations as the President may prescribe, any civilian officer or employee of the Government who, in the interest of the Government, is transferred from one official station to another, * * * for permanent duty, shall * * * be allowed and paid from Government funds the expenses of travel of himself and the expenses of transportation of his immediate family (or a commutation thereof

in accordance with section 73a of this title) and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects * * *.

3. The pertinent Armed Services procurement provisions are 70A Stat. 127–133, 10 U.S.C. 2301–2314. Section 2304 provides:

§ 2304. Purchases and contracts: formal advertising; exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

* * * * *

(2) the public exigency will not permit the delay incident to advertising;

* * * * *

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

* * * * *

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable * * * or were not independently reached in open competition, and for which * * * (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *

Section 2305(c) provides:

§ 2305. Formal advertisements for bids: time; opening; award; rejection;

* * * * *

(c) * * * Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

4. The Federal Property and Administrative Services Act of 1949, 63 Stat. 383, 393-397, as amended, 40 U.S.C. 481, 41 U.S.C. 251-260. Section 252 provides:

252. Purchases and contracts for property—

(a) Applicability of chapter; delegation of authority.

The provisions of this chapter shall be applicable to purchases and contracts for property or services made by—

(1) The General Services Administration for the use of such agency or otherwise * * *

* * * * *

(c) Negotiated purchases and contracts for property; conditions.

All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

* * * * *

(2) the public exigency will not admit of the delay incident to advertising;

* * * * *

(10) for property or services for which it is impracticable to secure competition;

* * * * *

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable * * * or have not been independently arrived at in open competition: *Provided,* That * * * (B) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *.

Section 253(b) provides:

§ 253. Advertising requirements.

Whenever advertising is required—

* * * * *

(b) * * * Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 481 provides:

§ 481. Procurement, warehousing, and related activities

(a) The [GSA] Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service * * *—

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as * * * transportation * * *; and

* * * * *

(4) with respect to transportation * * * for the use of executive agencies, represent such agencies in negotiations with carriers * * * and in proceedings involving carriers * * * before Federal and Senate regulatory bodies * * *.

FEDERAL REGULATIONS

1. Executive Order 10530, 3 CFR 189 190 (1954 1958):

* * * * *

Section 1. The Director of the Bureau of the Budget is hereby designated and empowered to perform the following-described functions without the approval, ratification or other action of the President:

* * * * *

(b) the authority vested in the President by [5 U.S.C. 73(b)-1(a), 73(b)-1(b)] to prescribe regulations (1) with respect to the allowance and payment from Government funds of the expenses of travel of any civilian officer or employee of the Government transferred from one official station to another for permanent duty, the expenses of transportation of his immediate family (or commutation thereof), and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects; and (2) with respect to reimbursement to such officer or employee on a commuted basis in lieu of the payment of actual expenses of transportation, [etc.] of his household goods and personal effects * * *.

2. Bureau of the Budget Circular No. A37, December 30, 1957:

Subject: Regulations prescribing revised commuted rates of reimbursement for transportation and temporary storage expenses for household goods and personal effects of civilian officers and employees upon transfer of official station within the continental United States

[Schedules of rates omitted.]

3. Bureau of the Budget Transmittal Memorandum No. 4, February 20, 1960, amending Circular No. A–37:

[Printed at R. 67–73.]

4. Relevant Department of Defense Regulations:

A. Directive No. 4500.27, July 1, 1960:

Subject: Transportation of Household Goods of Military and Civilian Personnel

[Printed at R. 38–47.]

B. The Military Traffic Management Regulation [promulgated by orders of the Secretaries of the Army, Navy, and Air Force], March 1958, as amended to October 10, 1960:

Chapter 101. INTRODUCTION

101001 *Purpose and Scope.* The Secretary of Defense designated the Secretary of the Army as Single Manager for Traffic Management within the United States by Department of Defense Directive No. 5160.14, dated 1 May 1956. * * * In accordance with the authorities and responsibilities contained in that directive, the Military Traffic Management Regulation is promulgated by the Single Manager. The regulation contains policy guidance and procedures which are applicable to the performance of traffic management functions including the direction, control, and supervision of all functions regarding the effective and economical procurement and use of commercial freight and passenger transportation service by the military departments within the continental United States. The regulation also contains policies and procedures to govern the movement of uncrated household goods between the continental United States and other areas in through bill of lading service as specified in chapter 217.

* * * * *

Chapter 102. GENERAL RESPONSIBILITIES AND TRAFFIC MANAGEMENT POLICIES

* * * * * * * *

102003. *Selection of Carriers or Modes of Transportation.*—* * * In the selection of commercial carriers, the means of transportation selected will be that which produces the lowest overall cost consistent with military requirements, the objectives of governing procurement regulations and the transportation policies as expressed by the Congress * * *, contingent upon carrier ability to provide safe, adequate and efficient transportation.

* * * * * * *

Chapter 201. FREIGHT TRAFFIC NEGOTIATIONS

201001 *Responsibilities of the Executive Director.*—The Executive Director, Military Traffic Management Agency is responsible within the Department of Defense for—

a. Determination of proper freight classification, rates, charges, rules and regulations on military traffic.

b. Negotiation with all for-hire carriers of cargo or their rate-making agencies for classifications, rates, charges, rules and regulations on military traffic * * *.

* * * * * * *

h. Reviewing and maintaining surveillance over new and reissued freight tariffs and tariff supplements to determine changes made thereby which would affect the routing or cost of moving military traffic.

i. Reviewing of all for-hire commercial carrier dockets or other proposals to determine the extent to which military traffic would be affected thereby, and taking action required.

j. Recommending litigation in the transportation and traffic management areas when nec-

essary to protect or promote the interests of the Department of Defense.

k. Receipt on behalf of the military departments of all negotiated and voluntary or unsolicited rate tenders relative to—

* * * * *

(5) Rates.

(6) Adjustment of tariff provisions.

(7) Special arrangements pertaining to other freight traffic * * *.

* * * * *

201005 *Freight Rate Negotiations. a. Opportunities for Rate Negotiations.*—Local transportation officers will be constantly alert to identify opportunities for rate negotiations as far in advance of movement as possible. They will forward this information * * * whenever—

(1) A planned volume movement is scheduled to move from one point of origin to one point of destination, for which the transportation charges will be paid by the Government. * * *

(2) A specific movement not of sufficient volume to report under (1) above that because of peculiar characteristics and/or circumstances presents a need for investigation of present transportation costs and possibility of an adjustment thereof.

b. Information To Be Furnished to MTMA.—The following information will be furnished in accordance with *a* above:

* * * * *

(6) Estimated total weight of shipment.

* * * * *

201006. *Classification Ratings. a. Need for Classification Revision of Negotiation.* Local transportation officers will forward the information indicated in *b* below under proper se-

curity classification to the Executive Director, MTMA, * * * whenever—

* * * * *

(2) It is believed that a rating is unreasonable; * * *

* * * * *

Chapter 202. ROUTING OF SHIPMENTS

* * * * *

202002 *Routing of Freight Traffic.* * * *

b. Specific Considerations. In choosing the carrier(s) for a specific shipment when two or more modes of transportation or individual carriers within a mode of transportation are in position to compete, the principal factors for consideration, in their relative order of importance, are satisfactory service, aggregate delivered cost, and equitable distribution of traffic. Except as otherwise provided for uncrated household goods in chapter 217, these factors will be given consideration as follows:

(1) *Satisfactory service.* * *

(2) *Delivered cost.* When more than one mode, or more than one carrier within a mode, can provide the required service, the mode or carrier(s) that will provide the lowest aggregate delivered cost will be selected. In addition to the actual transportation rates and charges, other known or readily available cost factors should be considered such as the costs for handling, loading, and unloading.

(3) *Distribution.* * * *

* * * * *

Chapter 214. BILLS OF LADING

* * * * *

214009 *When Government Bills of Lading Are Required.*—Government bills of lading are required for all shipments moving via commercial carriers between points in the continental United States for which the Government is responsible for payment of transportation

charges direct to carriers concerned, except when departmental regulations provide otherwise.

* * * * *

Chapter 217. HOUSEHOLD GOODS

217001 *Purpose and Scope.* The Secretary of Defense establishes Department of Defense policy for the transportation of household goods. This chapter implements that policy and establishes traffic management procedures governing the transportation of uncrated household goods of military and civilian personnel of the Department of Defense between points within the United States and between the United States and other areas in through bill of lading service when the transportation is procured and arranged by an agency of the Department of Defense. This chapter does not apply to the movement of—

a. Packed or crated household goods * * *.

b. Household goods of civilian personnel when personally arranged for under the commuted allowance plan.

* * * * *

217002 *Definitions.* As used in this chapter, the following definitions apply:

* * * * *

d. Lowest Overall Cost. The aggregate of all costs which are known or can reasonably be estimated in connection with a shipment: transportation rate(s), accessorial, drayage, storage-in-transit, packing and crating, unpacking * * *.

* * * * *

217004 *Responsibilities of the Executive Director, Military Traffic Management Agency.* The Executive Director, MTMA, is responsible for—

a. Traffic management in the transportation of household goods.

b. Implementing Department of Defense policy in the traffic management of household goods.

* * * * *

c. Accepting tenders of service from commercial carriers of household goods, reviewing such tenders and approving or disapproving carriers for use by military installations. * * *

* * * * *

f. Negotiating special tenders, agreements, or arrangements with commercial carriers for the movement of household goods.

* * * * *

k. Monitoring household goods carriers' compliance with the procedures set forth in joint military publications.

* * * * *

217010 *Tender of Rates and Charges. a.* Special tenders of rates or charges, either of individual carriers or tariff publishing agents, must be submitted in writing to the origin transportation officer. These tenders may be canceled or modified by the carrier upon written notice of not less than 30 days to the transportation officer, except—

* * * * *

(3) Cancellation or modification as may be accomplished upon shorter notice by mutual agreement of the parties concerned.

* * * * *

217012 *Distribution of Traffic and Selection of Carrier. a. Area Served, Availability of Equipment and Facilities.* * * *

b. Selection of Carriers. Only those carriers shall be used which provide high quality service at the lowest overall cost to the Government.

c. Distribution of Traffic.

* * * * *

C. The Joint Travel Regulations, Chapter 8, April 1, 1959, as amended to October 1, 1961:

TRANSPORTATION OF HOUSEHOLD GOODS

* * * * *

8001 DETERMINATION OF MODE OF SHIPMENT

Transportation of household goods is authorized by the mode of transportation * * * which results in the lowest over-all cost to the Government and which provides the required service satisfactorily. If the lowest over-all cost mode cannot provide the required service satisfactorily, the next lowest cost mode shall be used. * * *

5. Relevant General Services Administration orders:

A. TPS 7460.1, March 15, 1960:
SUBJECT: Procedures for Handling Mass Movements of Household Goods and Personal Effects

[Printed at R. 51–66.]

B. Adm 5450.3, Change 4, July 31, 1959:

* * * * *

Part 10. TRANSPORTATION AND PUBLIC UTILITIES SERVICE

Section 1. Commissioner

141. *Responsibilities.*

a. The Transportation and Public Utilities Service is responsible for the development of Governmentwide policies and regulations governing the procurement and utilization of transportation, public utilities, and communications services in the executive agencies; for assisting in the improvement of transportation and traffic practices of executive agencies and assurance of conformity with applicable statutes and GSA policies. * * *.

b. This service is responsible for the provision of advice and expert testimony on behalf of executive agencies in proceedings before Federal and State regulatory bodies involving transportation, public utilities [and] communications * * *; for the representation of executive agencies in negotiations of rates and contracts for transportation, public utilities, and communications services, and the administration of these arrangements, and for the design of rates and rate schedules for public utility service; for the provision of technical advice and assistance to GSA and other executive agency contracting officers in the development and use of transportation terms and conditions for inclusion in invitations to bid and contracts for supplies and equipment, and in the furnishing of transportation cost data for use in the evaluation of bids; and for the negotiation with carriers and carrier committees for fair and reasonable transportation rates, storage-in-transit agreements, and rules and regulations pertaining to volume movements of executive agencies.

c. It is also responsible * * * for assistance to the Bureau of the Budget in the development of regulations governing the transportation of Government employees, their personal effects, and household goods. * * *

142. *Authorities.* The Commissioner, TPUS, in carrying out his assigned program responsibilities exercises authority, such as, but not limited to, the following:

a. *Procurement and Contracting.*

* * * * *

(*a*) Negotiates purchases and contracts for property and services without advertising, and makes any determinations and decisions required in connection therewith * * *.

(b) Makes purchases and contracts for property and services by advertising and deter-

mines that rejection of all bids is in the public interest.

(c) Determines the type of negotiated contract which will promote the best interests of the Government * * *.

* * * * *

Section 2. Office of Assistant Commissioner For Transportation

* * * * *

146. *Transportation Operations Division.*

* * * * *

c. Negotiates for adjustments in rates and charges for specific movements; negotiates necessary contracts, including service agreements, such as storage-in-transit, master weight, average demurrage agreements, and charter parties; maintains current lists of foreign freight forwarders and arranges for their services; negotiates accessorial and other special service arrangements, such as packaging, crating, and freight car leasing.

* * * * *

Section 10. Regional Transportation and Public Utilities Service

* * * * *

189. *Transportation Operations Division.*

* * * * *

b. Negotiates and administers contracts and agreements for special services for which made responsible, such as packing and crating, drayage, * * * and the movement of personal property to new locations for GSA and executive agencies.

APPENDIX C

GEORGIA HOUSEHOLD GOODS TARIFF No. 1-B, MF No. 3

* * * * * *

RULE 8. COMPUTING CHARGES

(a) Except as otherwise provided herein, rates in this tariff are stated in dollars and cents per 100 pounds and total charges shall be computed by multiplying weight of each shipment by the rate shown per one hundred pounds, except as provided in paragraph (b) of this rule.

(b) Transportation charges based on actual weight at the rate provided therefor shall not exceed charges based on the next higher minimum weight at the rate provided for such higher minimum weight.

NOTE: The weights shown under columns headed "Break Point" in Section III are the weights at which a lower charge develops by use of minimum weight and applicable rate shown in the next higher weight bracket.

* * * * * *

RULE 15. BILL OF LADING

All shipments transported under this tariff will be covered by a UNIFORM HOUSEHOLD GOODS BILL OF LADING, the original of which MUST be issued to shipper at time of carrier taking possession of the shipment. The names of only one shipper and one consignee shall appear on one bill of lading, but the bill of lading may also specify the name of a party to notify of the arrival of the shipment at destination. Property of two or more families or establishments will not be accepted for transportation as a single shipment.

NOTE: Reproduction of Uniform Household Goods Bill of Lading appears at end of Section 1.

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[A certified copy of the entire tariff, as amended to May 30, 1960, has been lodged by the United States with the Clerk of the Court.]